

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

JILL DILLARD, JESSA SEEWALD,
JINGER VUOLO, and JOY DUGGAR,

Plaintiffs,

VS.

CASE NO.
5:17-cv-5089-TLB

CITY OF SPRINGDALE, ARKANSAS;
WASHINGTON COUNTY, ARKANSAS;
KATHY O'KELLEY, in her
individual and official
capacities; ERNEST CATE, in
his individual and official
capacities; RICK HOYT, in his
individual and official
capacities; STEVE ZEGA, in
his official capacity;
BAUER PUBLISHING COMPANY,
L.P.; BAUER MAGAZINE L.P.;
BAUER MEDIA GROUP, L.P.;
BAUER, INC.; HEINRICH BAUER
NORTH AMERICA, INC.; BAUER
MEDIA GROUP USA, LLC; and
DOES 1-10, inclusive,

Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TIMOTHY L. BROOKS
September 25, 2017; 10:48 a.m.
FAYETTEVILLE, ARKANSAS

Proceedings recorded in realtime via machine shorthand.

Dana Hayden, CCR, RMR, CRR
Federal Official Court Reporter
35 East Mountain Street
Fayetteville, Arkansas 72701

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1 THE COURT: The next matter to come before the
2 Court today is the case involving plaintiffs Jill
3 Dillard, Ginger Vuolo, Jessa Seewald, and Joy Duggar
4 versus defendants -- let me group those a little bit --
10:48AM 5 the City of Springdale, Kathy O'Kelley, and Ernest Cate;
6 and then with regard to Washington County defendants,
7 Rick Hoyt and Steve Zega; and then there are a multiple
8 set of defendants having to do with Bauer Publishing
9 Company. I'm just going to refer to those today as the
10:48AM 10 Bauer defendants.

11 Our case number is 5:17-CV-5089. The posture
12 of this case is that the complaint has been filed and
13 served upon all of these defendants. The City and
14 County defendants have filed motions to dismiss that
10:48AM 15 have to do with their immunity and have sought and have
16 previously obtained relief from the Court that all other
17 aspects of the litigation effectively be stayed until
18 the Court rules on the immunity issues, so we are here
19 today to take up those motions that have been filed by
10:48AM 20 the City of Springdale defendants and the County
21 defendants respectively.

22 Appearing on behalf of the plaintiffs today to
23 argue in opposition would include Shawn Daniels, Sarah
24 Jewell and Steven Bledsoe. Pleasure to have all of you
10:48AM 25 here today.

1 Representing the City of Springdale is going to
2 be Justin Eichmann, Tom Kieklak, and Susan Kendall; and
3 representing the Washington County defendants would be
4 Jason Owens. Pleasure to have all of you here as well.

10:48AM

5 Now, I understand that even though today's
6 motions do not pertain to the Bauer Publishing group of
7 defendants, we also have attorney Cynthia Kolb present
8 on behalf of Bauer.

9 MS. KOLB: Yes, your Honor.

10:48AM

10 THE COURT: Pleasure to have you here as well.

11 Well, the Court understands that the underlying
12 piece of litigation here involves the plaintiffs who,
13 back in 2016, were minors, I believe all 16 years of age
14 or younger, and they had been interviewed by law

10:48AM

15 enforcement authorities locally pertaining to
16 allegations of some type of sexual assault by a family
17 member. There's an allegation that, in the course of
18 those investigations, the minors were promised the
19 statements and comments that they made in the interviews
20 would be, and would remain, confidential.

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21 As a consequence of the evidence and statements
22 that were made at that time, the Washington County
23 prosecutor did file a FINS petition on behalf the
24 juvenile in the Washington County court, but there was
25 no criminal action pursued against the family member,

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1 which was the brother of the minor females. The Court
2 understands from the briefing that that was due to the
3 expiration of the statute of limitations against the
4 brother.

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5 So flash forward about nine or ten years and
6 both the City and the County received FOIA requests from
7 one or more of the Bauer Publishing entities, either
8 directly or through their attorneys that have been
9 retained to make requests on their behalf.

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10 Although there is a lot of detail and nuance in
11 between, the bottom line is that both the City of
12 Springdale and the Washington County defendants released
13 certain redacted incident reports that had been
14 maintained since 2006.

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15 Those were released on consecutive days in May
16 of 2015; and both before and after those redacted
17 incident reports were released, the Bauer Publishing
18 defendants published sensationalized news tabloid type
19 of stories about the plaintiff sisters being abused by
20 their brother when they were minors.

10:48AM

21 So as it pertains to the motions today, there
22 have been actions brought against certain employees of
23 the City of Springdale: Ernest Cate is the city
24 attorney, and Kathy O'Kelley, who at the time was the
25 chief of police in Springdale. They are alleged to be

10:48AM

1 the decisionmakers as it relates to the release of the
2 nine- or ten-year-old incident reports.

3 As it relates to the Washington County
4 defendants, Major Rick Hoyt, who was an enforcement
10:48AM 5 major at the time, along with county attorney Steve
6 Zega, are named as defendants. Kelley, Cate, and Hoyt
7 are sued in their official and individual capacities,
8 and that makes a difference, as we will learn; and
9 attorney Zega was sued in his official capacity.

10:48AM 10 There are both constitutional claims and tort
11 claims. The constitutional claims include federal
12 constitutional claims under the Fourteenth Amendment.
13 They contend they were denied Fourteenth Amendment due
14 process as a consequence of violations of their right to
10:48AM 15 privacy and confidentiality. Those actions are brought
16 pursuant to 42 U.S.C. Section 1983.

17 There are also claims under the Arkansas
18 Constitution for due process issues having to do with
19 privacy violations as well. Those claims are brought
10:48AM 20 pursuant to the Arkansas Civil Rights Act.

21 And then so there are -- the motions, as I
22 understand them, all have to do with immunity, but we
23 certainly have immunity claims as it relates to the
24 constitutional claims; but there are also tort claims
10:48AM 25 that have been brought, two tort claims against the --

1 against these defendants, the public employee
2 defendants, two counts of invasion of privacy under
3 different legal theories and then also for the tort of
4 outrage.

10:48AM

5 So let me kind of determine who's going to be
6 arguing on behalf of the parties. Mr. Eichmann, who's
7 going to be arguing on behalf of the Springdale
8 defendants?

10:48AM

9 MR. EICHMANN: Your Honor, along with Tom and
10 Susan, what we would like to ask the Court permission is
11 I would address the qualified immunity with regard to
12 O'Kelley, Tom will address the claims with regard to
13 municipal liability, and Susan would address the torts,
14 as well as the statutory immunity claims, if that is
15 acceptable.

10:48AM

16 THE COURT: All right. That's fine. I do want
17 to divide this up. I want to take up the constitutional
18 claims first, let y'all make your presentation on those,
19 and then I'll let the plaintiffs respond and then we'll
20 transition to the tort claims. I'll let the plaintiffs
21 respond to those.

10:48AM

22 Mr. Bledsoe, who is going to be arguing on
23 behalf of the plaintiffs?

24 MR. BLEDSOE: Me, your Honor.

10:48AM

25 THE COURT: And then, Mr. Owens, you're here

1 all by your lonesome.

2 MR. OWENS: Genius stands alone, your Honor.

3 THE COURT: All right. So Mr. Owens will be
4 arguing on behalf of Washington County.

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5 And Ms. Kolb, my assumption is that, as far as
6 today's proceedings go, you don't have a dog in the
7 proverbial hunt; is that correct?

8 MS. KOLB: That's correct, your Honor.

10:48AM

9 THE COURT: All right. The Court has reviewed
10 the motions and briefs in support, as well as the brief
11 in response and the reply briefs. So, Mr. Eichmann,
12 Ms. Kendall, I would ask the Springdale defendants to go
13 first as it relates to your motions to dismiss the
14 official and individual capacity constitutional claims.
15 I'll leave it to y'all to take up whichever issue first
16 based on how you've divided that up.

10:48AM

17 MR. EICHMANN: Thank you, your Honor. And
18 would you like me to speak from the podium?

19 THE COURT: Please.

10:48AM

20 Thank you, your Honor. Is this on? Yes.

21 Thank your Honor. I appreciate the opportunity
22 to speak to the Court today regarding our motions to
23 dismiss.

10:48AM

24 As I mentioned, Tom Kieklak, Susan Kendall, and
25 myself represent the City of Springdale, Ernest Cate in

1 his individual and official capacities, and chief --
2 former chief, retired chief, Kathy O'Kelley in her
3 individual and official capacities.

4 I think as the Court just went through for a
10:48AM 5 few minutes the structural background of this case,
6 there's quite a story here. This is a matter which
7 began for the city in regarding the investigation back
8 in 2007; but what triggered this litigation began in
9 2015 with an FOI request that I received and so that's
10:48AM 10 where I think I'd like to begin because I don't think
11 you can talk about this case or these motions without
12 talking about the Arkansas Freedom of Information Act.

13 The Arkansas Freedom of Information Act was
14 actually adopted 50 years ago in 1967. It was
10:48AM 15 considered a premier accomplishment, legislative
16 accomplishment, by Governor Rockefeller. And if you
17 look at the Arkansas attorney general website, the FOI
18 handbook, which is published by the Arkansas Press and
19 the Arkansas AG's office are the preeminent authority on
10:48AM 20 the FOI, the book of Arkansas FOI published by Professor
21 Watkins and Peltz. There's a statement that the
22 Arkansas FOI is one of the most and strongest open
23 record laws in the country, and there's 50 years of case
24 law to support that, but there's also something very
10:48AM 25 unique about the Arkansas FOI that is not found in other

1 legislation is that the Arkansas General Assembly in
2 1967 took the opportunity to set forth its legislative
3 intent, again which is rare and unique for Arkansas
4 legislation.

10:48AM

5 And that intent is set forth in 25-19-102 of
6 the FOI, and it begins with the statement of, "It is
7 vital in a democratic society that public business be
8 performed in an open and public manner so that the
9 electors shall be advised of the performance of public
10 officials and of the decisions that are reached in
11 public activity and in making public policy."

10:48AM

12 So that sets forth the importance, and the
13 legislative intent goes on, but that sets forth the
14 importance of the legislature in establishing this open
15 records act 50 years ago. And then from that there are
16 four principles of the FOI that I've grouped together
17 from case law and from the statute itself which have
18 been found prominent and preeminent in those 50 years,
19 and one of those is the public interest that the FOI was
20 passed wholly in the public interest and is to be
21 liberally interpreted.

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22 The language of the act is so clear and so
23 positive that it hardly needs to be interpreted, and the
24 statutes enacted for the interest and benefit -- of the
25 public interest and benefit are to be interpreted

10:48AM

1 favorably to the public. And that comes to us from the
2 court -- the Arkansas Supreme Court in the Fayetteville
3 v. Edmark case.

4 Secondly, the Courts have established, and the
10:48AM 5 FOI is clear, that exceptions to the FOI are to be
6 interpreted narrowly. Arkansas interpreted the
7 exceptions to the FOI nearly --

8 THE COURT: Mr. Eichmann, I understand that the
9 core of all of the factual development of the case
10:48AM 10 relates to the FOIA, and but for that, these records
11 would not have been disclosed by the City; but your
12 motion is one seeking immunity from suit.

13 I think FOIA, while important and why we
14 understand that why we're here in many respects, I don't
10:48AM 15 know that that has a lot to do with the immunity issues
16 that the Court must rule on.

17 MR. EICHMANN: Your Honor, it's the defendant's
18 position that the FOI colors that entire discussion
19 because in order to establish a violation of a right and
10:48AM 20 whether that right was clearly established, you have to
21 look at the underlying law in the State of Arkansas, and
22 that has to do with not only the preeminence of the FOIA
23 but also the exceptions to the FOIA which, as brought
24 forth in plaintiff's complaint, are the Child
10:49AM 25 Maltreatment Act of the Arkansas Juvenile Code, as well

1 as a statute from the criminal procedure code of the
2 State of Arkansas.

3 So what is important about that is that there's
4 this tension and so you have to resolve that tension in
10:49AM 5 order to find out whether there's been a violation of
6 underlying right and whether that right was clearly
7 established in Arkansas.

8 And, your Honor, I'll move forward perhaps with
9 just mentioning what my other two points petitioner --

10:49AM 10 THE COURT: All right.

11 MR. EICHMANN: -- and then I'll certainly
12 advance.

13 The third being that when a record obtains
14 exempt and nonexempt material that the FOIA instructs us
10:49AM 15 to segregate or to redact the material, and the fourth
16 being that there are criminal penalties associated with
17 the Freedom of Information Act, as well as attorneys'
18 fees provision.

19 So over 50 years, public officials have been
10:50AM 20 instructed through a wealth of case law on the
21 preeminence of the FOI and the importance in following
22 that, and I raise it because this case did begin with an
23 FOI, a request. And for the purposes of the plaintiffs'
24 constitutional claims against Cate and O'Kelley, it's
10:50AM 25 important at this stage, and as we're at a motion to

1 dismiss, that we look at the facts that are alleged in
2 plaintiffs' complaint, and those two facts that I
3 believe are central to the claim for qualified immunity
4 are that the attorney in Little Rock, Abtin
5 Mehdizadegan, you know, May 15th, 2015, issued an FOI
6 request to the City of Springdale and to Washington
7 County, both on the same day.

8 That FOI request asks for files pertaining to
9 Josh Duggar, Michelle Duggar, and Jim Bob Duggar; and
10 the FOI request also mentions a police investigation and
11 that Springdale investigator, Mr. Darrell Hignite, was
12 involved in that investigation.

13 That in Paragraph 48 of the complaint, the
14 plaintiff mentions that a response to the FOIA is due in
15 May 20th, 2015; further, that on May 19th, the day
16 before the response was due, or the day before the City
17 and County responded, that In Touch magazine published
18 an article titled "'19 Kids and Counting' Son Named in
19 Underage Sex Probe," and the article -- and the
20 allegation continues that the article contained specific
21 allegations about the investigation.

22 And, lastly, that the report -- as your Honor
23 mentioned earlier, the report was redacted, and there
24 are no allegations in the complaint that any names or
25 ages of the victims were clear in that, for example, in

1 Paragraph 54 of the complaint that Chief O'Kelley
2 instructed members of the SPD to redact the police
3 report before releasing.

4 So we believe that in looking at the
10:52AM 5 qualified -- our qualified immunity argument that you
6 have to look at the FOI; you have to look at the facts
7 that are alleged in the complaint in order to establish
8 whether there was a violation of the underlying right
9 and whether there was -- whether that law would have
10:52AM 10 been clearly established.

11 With regard to qualified immunity, the City of
12 Springdale would like to point out that qualified
13 immunity exists in order to provide breathing room for
14 officials to make mistake in judgments, and it protects
10:53AM 15 all but the plainly incompetent or those who knowingly
16 violate the law.

17 There is ample noting in the briefing that is
18 before the Court on the purpose and the reasons of the
19 principles as of qualified immunity. However, when it
10:53AM 20 comes to an evaluation of the claims, the Courts have
21 instructed us to look at either the violation of the
22 right or both, a violation -- whether there was a
23 violation of the constitutional right or whether that
24 law underlying the violation was clearly established at
10:53AM 25 that time.

1 With regard to the violation of the
2 constitutional right, the plaintiffs' claim consists
3 twofold: One, that Springdale released confidential
4 information of a highly personal nature; and second is
5 of the promise of -- or the pledge of confidentiality
6 that was allegedly given to the plaintiffs.

7 I'd like to firstly point out that there is no
8 allegation in the complaint that there was a pledge of
9 confidentiality that came from any Springdale defendant
10 or Springdale employee; in fact, the opposite is true.
11 The pledge of confidentiality came, it is alleged in the
12 complaint, came from the Arkansas State Police and the
13 Arkansas State Police investigator.

14 With regard to the release of the confidential
15 and intimate, personal information of the plaintiffs,
16 what I believe the defendants' briefs point out, your
17 Honor, is that the plaintiffs failed to establish the
18 requisite culpability and that the facts were already
19 known to be public.

20 With regard to the failure to establish the
21 culpability, the defendants would like to point the
22 Court toward Hart v. Little Rock and that was a case
23 that came out of the Eastern District and was decided by
24 the Eighth Circuit Court of Appeals, and that case
25 involves the release of personnel files of police

1 officers pursuant -- in that case pursuant to a subpoena
2 that was issued by an attorney representing criminal
3 defendants.

4 The attorney received the personnel file,
10:55AM 5 handed it over to the criminal defendants; and as the
6 allegations go in the complaint, these criminal
7 defendants pled guilty but then used the information in
8 the report to harass or terrorize the officers over a
9 period of time in which the officers ended up suing the
10:55AM 10 City and individuals for invasion of privacy, and the
11 Eighth Circuit in that case groups together kind of the
12 culpability standards that are required in order to
13 establish a -- what's a 1983 claim for invasion of right
14 of privacy.

10:56AM 15 In that they say that mere negligence can never
16 be conscience-shocking and cannot support a claim
17 alleging a violation of substantive due process; that
18 gross negligence is not actionable; that the level of
19 abuse of power must be so brutal and offensive that it
10:56AM 20 does not comport with traditional ideas of fair play and
21 any humane -- fair play and decency; that it must be
22 inspired by malice or sadism rather than merely careless
23 or unwise excessive zeal and amounts to a brutal and
24 inhumane abuse of official power, literally shocking to
10:56AM 25 the conscience.

1 And it notes what the lowest standard available
2 is and that is that there is time to deliberate on the
3 decision and that being deliberate indifference; that at
4 the precise moment, as the Court says, at the precise
5 moment when the defendant released the records that he
6 or she recognized and deliberately disregarded the
7 substantial risk of serious harm.

8 In the brief, and before you today, is --

9 THE COURT: Mr. Eichmann, in Alexander versus
10 Peffer, P-e-f-f-e-r, 1983 case out of the Eighth
11 Circuit -- you alluded to this a second ago -- there's
12 also this notion that there's a flagrant breach of a
13 pledge of confidentiality.

14 So two things: A, I realize that you have
15 substantive defenses, factual defenses, to many of the
16 allegations; but, of course, the Court today must look
17 at the facts as stated in the complaint as true to draw
18 any reasonable inferences that may exist.

19 But this flagrant breach, are you saying that
20 the only way that that comes into play is if the party
21 defendant is literally the person that made the pledge
22 of confidentiality?

23 MR. EICHMANN: Your Honor, if you look at the
24 complaint and take the facts as true, there is no
25 allegation -- we've established there's no allegation in

1 the complaint saying that any Springdale defendant made
2 that pledge of confidentiality.

3 However, it is the --

4 THE COURT: Do you deny that a pledge of
10:58AM 5 confidentiality was made at the time that the interviews
6 were given?

7 MR. EICHMANN: There's no allegation that one
8 was made. And so the Springdale -- you know, what we
9 can do is go off of the allegations in the complaint,
10:59AM 10 and the complaint contains no such allegation that it
11 occurred.

12 And obviously should this case go forward, you
13 know, that would be, you know, facts that might come
14 forward in the future. But this gets a little bit into
10:59AM 15 the interplay between the different agencies that were
16 involved in this investigation, and Springdale was
17 involved pursuant to a criminal investigation, which is
18 a little bit different than what the State Police and
19 DHS does.

10:59AM 20 But had there been a pledge of confidentiality
21 alleged, I would expect to have found it within the
22 pleading, and it is not -- it is simply not there. But
23 even so, if you look at the allegations that are
24 contained in the complaint and in plaintiffs' response,
11:00AM 25 they speak more towards negligence than towards any type

1 of intent that would rise to deliberate indifference.

2 Those allegations include that defendants,
3 either Cate or O'Kelley, hastily or improperly released
4 the report, that they failed to consult, that they
5 attempted to take back the report, but it was too late,
6 all of which are actions that establish negligence in a
7 complaint, not of which shows that at the time when the
8 records were released, they recognized and deliberately
9 disregarded a substantial harm. And again, there's no
10 allegation in the complaint that, as far as the
11 Springdale defendants go, that the names or the ages of
12 any of the plaintiffs were left unredacted in the
13 report.

14 The third point with regard to whether there
15 was a violation of the constitutional right is that the
16 facts were already public. The complaint mentions that
17 the Washington County submitted -- or responded to the
18 FOI request --

19 THE COURT: Excuse me. I thought that I
20 recalled the allegations actually in Paragraph 2: As
21 part of the investigation, police investigators
22 interviewed plaintiffs. The investigators promised
23 plaintiffs that their statements would remain
24 confidential and not be disclosed to the public.

25 MR. EICHMANN: If I recall that allegation

1 correctly, your Honor, in allegation 2 it talks about
2 the investigators, which, in this case there was
3 Springdale Police Department, Washington County,
4 Arkansas State Police, and DHS.

11:02AM

5 The -- I believe it's in --

6 THE COURT: Well, a minute ago you were saying
7 that there was no such allegation in the complaint, and
8 I think that we've established that there is. So the
9 next question is, is it your position that it's -- that

11:02AM

10 that prong of the Eighth Circuit case that I mentioned a
11 moment ago can only come into play if the city actor who
12 breached a pledge of confidentiality was the same actor
13 that made the pledge? Is that what your position is?

14 MR. EICHMANN: It is, your Honor. Otherwise,
15 how could there be the pledge of confidentiality. I
16 understand that when the plaintiffs would say --

11:03AM

17 THE COURT: So in a combined -- in a
18 multijurisdictional investigation, the detective who is
19 acquiring statements and pledges, the confidentiality of
20 those statements to a minor and their parents, that
21 pledge is meaningless, is it not, if a different member
22 of a different law enforcement agency is permitted carte
23 blanche to violate that pledge? Is that not the logical
24 extreme of what you're saying?

11:03AM

11:04AM

25 MR. EICHMANN: Well, the -- your Honor, the

1 plaintiffs' complaint alleges that they were -- that an
2 investigator from the state police made the pledge and
3 then they set forth saying that that pledge was violated
4 by Springdale. It stands to reason that Springdale
5 would have need to have made the pledge in order to have
6 violated it.

7 Your point is in the context of all of the
8 investigations, would it require a pledge from every
9 single agency. Springdale's position is that it
10 violated no pledge, even if a pledge was given, because
11 it redacted the report as required by the FOI. It
12 interpreted the privacy of the FOI and the narrowness of
13 the exceptions in the instruction for the General
14 Assembly to segregate and redact and that is what it
15 did.

16 So Springdale's position is that it didn't
17 violate any pledge, but it's also pointing out that
18 there's no allegation that it gave such a pledge.

19 THE COURT: What difference does that make?

20 MR. EICHMANN: What difference does the fact
21 that --

22 THE COURT: That the fact that a City -- an
23 investigator employed by the City of Springdale, what
24 difference does it make that it was not a Springdale
25 city employee that made the pledge?

1 MR. EICHMANN: Because, your Honor, it would
2 move over to the second prong of qualified immunity on
3 whether it is clear and established. How would they
4 know they violated the law if they didn't give the
11:05AM 5 pledge. And, you know, it doesn't speak necessarily to
6 the establishment of the constitutional right violation,
7 but it certainly speaks to whether that was clearly
8 established or not. If it's not the -- if there's no
9 allegation that any Springdale official made such a
11:05AM 10 pledge of confidentiality, how could it have known that
11 it violated a right by disclosing a redacted report?

12 So the third part of Springdale defendants'
13 argument is that the facts were already public, that
14 Washington County -- it's alleged in the complaint that
11:06AM 15 Washington County, at the same time as it released the
16 Springdale police report, issued an underredacted report
17 that --

18 THE COURT: It issued a what?

19 MR. EICHMANN: An underredacted police report
11:06AM 20 in which it was -- it alleged that people were able to
21 specifically identify each of the plaintiffs from the
22 underredacted report and that was an FOI that was
23 responded to contemporaneous with the Springdale police
24 report; but also that you have the publishing of the
11:06AM 25 online article that states not only in the allegation

1 that it contained specific details about the
2 investigation, but it teased a promotion for a story
3 that was going to run the next day in the newsstand
4 article with more details about the incident.

11:07AM

5 So with those three component parts in mind,
6 you know, Springdale defendants would like to urge the
7 Court that there's not a violation of a constitutional
8 right that's been pled in the complaint; but even if
9 there is, we don't have to go that far because that
10 right was not clearly established.

11:07AM

11 In the case law that -- in the case law that
12 interprets the second prong of qualified immunity,
13 whether that right was clearly established or not, the
14 Court asked us to look into the violation -- excuse me.
15 The Court asked us to take a specific inquiry into
16 the -- or inquiry into the specific context of the case.

11:07AM

17 In the pleadings there's a disagreement between
18 the plaintiffs and the Springdale defendants over what
19 the nature of that inquiry should be. Plaintiffs urge
20 this Court to take a broad view of whether or not the
21 law was clearly established, and defendants ask -- or
22 state that the Court should undertake a review,
23 undertaken in the light of the specific context of the
24 case into looking at whether the law was clearly
25 established. The defense -- the plaintiffs cite to the

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11:08AM

1 Lindsey case for the establishment that a broad view was
2 requested.

3 Your Honor, it's the belief of the Springdale
4 defendants that the plaintiffs are urging a broad view
11:09AM 5 review of whether the law was clearly established
6 because they can provide no case, no authority on point
7 which establishes that Springdale violated a
8 constitutional right in this case.

9 The specific context of this case is that there
11:09AM 10 was an Arkansas Freedom of Information Act request, that
11 two officials have been sued for responding to that
12 request, that the police report was redacted, that there
13 are no names or ages of the victims which are alleged to
14 have been disclosed, and that the report was released to
11:09AM 15 the specific requester, to the attorney, the attorney in
16 Little Rock.

17 Plaintiffs have supplied no case that involves
18 the Arkansas Freedom of Information Act that talks about
19 tension between that act and the statutory authorities
11:10AM 20 that it supplies; rather, the cases that are supplied do
21 not talk about a situation where a public official is
22 under compulsion to disclose a document such as a police
23 report; rather, the cases that they cite are situations
24 where the disclosal -- the disclosure is willful or with
11:10AM 25 malice or was something that was completely

1 discretionary for the City or the city official to do;
2 for instance, a press conference such as was done in
3 the -- I believe it's the Stafford/Pell case from the
4 Northern District of California; or in the Ribar case
11:11AM 5 out of the Sixth Circuit, it's the sheriff who discloses
6 the information about -- about the rape to -- in order
7 to justify, you know, kind of a lack of action, of an
8 investigation report.

9 THE COURT: Do you think that the then-minor
11:11AM 10 sisters had a legitimate expectation that the
11 information that they gave in what was deemed to be a
12 confidential interview, do you believe that they had a
13 legitimate expectation that that would remain private?

14 MR. EICHMANN: Yes, to the extent that the law
11:11AM 15 requires; and this is the tension that is here between
16 the FOI and its exceptions and how you have to interpret
17 that, which for 50 years has been the preeminence of the
18 FOI and the narrowness of the exceptions to the extent
19 that you redact documents, and for 50 years that's what
11:12AM 20 people have done.

21 I realize this is not a part of the pleadings,
22 but we don't need to leave our awareness of what's in
23 the paper every day go by, where you see even multiple
24 stories involving crimes, even crimes of a sexual nature
11:12AM 25 against a child in which, you know, the facts have

1 established, you know, a 3-year-old at -- you know, at a
2 house, the redacted facts of what happened and who the
3 name of the perpetrator was and so forth and so on.

4 That has been the response of public officials
11:12AM 5 to the FOI for 50 years and so, you know, that
6 expectation of privacy comes through with redaction; and
7 if the claim is that a online user on a celebrity, fan
8 or not fan -- website -- I'm not sure which one it is --
9 was able to sleuth the identities of who these

11:13AM 10 plaintiffs were, as it says in the allegations, by the
11 length of the redaction or by the fact that there's
12 international celebrity involved, one, that -- you know,
13 if there's an allegation that it was underredacted, that
14 brings into play negligence and not intent.

11:13AM 15 THE COURT: But it also brings into play
16 whether that's merits issue or an immunity issue, does
17 it not?

18 MR. EICHMANN: But all we can go by is by the
19 allegations that are contained in the complaint; and the
11:13AM 20 allegations that are contained in the complaint is that
21 a report was redacted and that neither the plaintiffs'
22 names or the ages, there's no allegation that that
23 information was provided.

24 You know, the plaintiffs did not attach the
11:14AM 25 police reports to the complaint; but we believe that

1 based upon the allegations, even if you take those to be
2 wholly true, that doesn't establish anything but
3 negligence, from what they've set forth so far.

4 So, your Honor, what's before you then, what
11:14AM 5 they have offered as what's clearly established are
6 three statutes, one of which is -- three statutes and --
7 excuse me -- some AG opinions regarding the statutes.

8 One of the statutes is a juvenile code, and the
9 Arkansas Juvenile Code is not applicable to this case
11:15AM 10 because it pertains to records relating to the arrest,
11 detention, or proceeding, juvenile proceeding; and as is
12 established by the facts alleged in the complaint,
13 there's no arrest in this case.

14 I think it states in the complaint that Josh
11:15AM 15 Duggar was never arrested, there was no -- therefore,
16 there was no detention and there was no criminal
17 proceeding regarding Josh Duggar; but also, Josh Duggar
18 was not a juvenile under the definition of "juvenile" in
19 the juvenile code. He was an adult at the time of the
11:15AM 20 investigation. So it is Springdale defendants' position
21 that the juvenile code simply does not apply.

22 Secondly, with regard to the criminal procedure
23 statute that prohibits the release of identifying
24 information that would directly or indirectly identify
11:16AM 25 the plaintiff, there's no explicit provision in there

1 saying that this is an exception to the Arkansas FOI.
2 The plaintiffs cite to an AG opinion citing the treatise
3 that I mentioned earlier from Watkins and Peltz that it
4 could likely be -- or likely create an exemption to the
11:16AM 5 FOI; but likely creating the exemption, it's certainly
6 not an establishment of a clearly -- clearly established
7 right.

8 And thirdly, the plaintiffs bring forward the
9 Child Maltreatment Act; and I believe Mr. Owens will
11:16AM 10 probably have something to say about that as well
11 because we gleaned from his writing in this case that if
12 you look at the wording of the Child Maltreatment Act,
13 the -- it's hopelessly absurd.

14 The act reads -- and the prohibitive language
11:17AM 15 in the act reads that any data, records, reports,
16 documents that are created or collected or compiled by
17 or on behalf of the Department of Human Services, the
18 department of Arkansas State Police or other entity
19 authorized under this chapter to perform investigations
11:17AM 20 or provide services to children, individuals, or
21 families shall not be subject to disclosure in the
22 Freedom of Information Act.

23 By the plain reading of that act, that states
24 that any data, report, document whatsoever from these
11:17AM 25 three entities are exempt from the FOI, and that just

1 cannot be. It cannot be that the Department of Human
2 Services is exempt from the FOI.

3 You have to read -- you have to either read
4 information, read provisions into this act to have that
11:18AM 5 narrowed down to, you know, pertaining to crimes against
6 a child or some type of limiting information there, or
7 you have to just assume that DHS and the department of
8 state police are completely exempt from the FOI.

9 THE COURT: Well, what role did DHS play in
11:18AM 10 bringing the FINS petition?

11 MR. EICHMANN: Your Honor, the FINS petition is
12 brought -- the Child Maltreatment Act concerns kind of
13 these administrative procedures on what you do when
14 there's a complaint; when there's a hotline call, what
11:18AM 15 do you do.

16 My understanding of how that came to be
17 developed is that they used to be done entirely by DHS.
18 DHS handled all of it. Whether that was an issue
19 administratively that DHS would handle internally or
11:18AM 20 whether it rose to such a level that they needed
21 investigatory help, they would bring in the State
22 police. They would bring in -- you know, they would
23 make a referral to a sheriff's department or a referral
24 to a city's police department for a criminal
11:19AM 25 investigation.

1 So the criminal investigations fall outside of
2 the Child Maltreatment Act; but administratively within
3 the Child Maltreatment Act, there is kind of a long list
4 of different types of conduct and who handles what,
5 between the DHS and between the Crimes Against Children
6 division.

7 THE COURT: But to the extent DHS is involved
8 in conducting an investigation into a child's home
9 situation that ultimately leads to the filing of a
10 Family in Need of Services petition in the juvenile
11 court, are you saying that that investigation, because
12 it's a state agency, is always subject to FOI?

13 MR. EICHMANN: Your Honor, I'm not -- I'm not
14 making that statement because I think it's clear that
15 DHS falls under the Child Maltreatment Act, but it is
16 unclear what the scope of the Child Maltreatment Act is
17 by the wording of it; and in order for you to arrive at
18 that decision that it's -- I mean, there are other
19 activities that DHS, Department of Human Services, does
20 besides child maltreatment.

21 I'm sure the department receives regular FOIs
22 that it responds to; but if you take the wording of this
23 act, the exemption from the FOI, it reads as if the
24 entire DHS or the entire state police is exempt because
25 they do these type of -- these type of investigations.

1 And what our argument is is that there's a
2 question -- there's an unclear issue of what the scope
3 of this exception is; and the FOI tells us if there is
4 an unclear -- if the scope is unclear, you have to not
5 only tailor that exemption narrowly, but you have to err
6 on the side of public disclosure, which is why in this
7 case and in countless others that happen every day
8 across the state, when a criminal investigation file
9 does not fall within the confines of the Child

10 Maltreatment Act, when that file is FOIed, you know, to
11 a city or to a sheriff's office, the procedure is -- and
12 that instruction has been for 50 years -- to redact, to
13 redact names, to redact -- to redact ages; and if
14 there's a redaction issue, then that falls under
15 negligence. It doesn't fall -- there's no allegation
16 here that there was any requisite intent.

17 THE COURT: Doesn't that go to the merits? I
18 mean, the Court is obligated to look at the allegations
19 and the reasonable inferences to be drawn from those
20 allegations in the light most favorable to the
21 plaintiffs; and you're asking the Court to say, well, we
22 made redactions, and to the extent that there is a lack
23 of clarity as to how the plaintiffs are characterizing
24 the extent to which there is a lack of proper redacting,
25 that's a fatal error at the immunity issue level.

1 MR. EICHMANN: You also have to take that in
2 light of the fact that there's no allegations of the
3 requisite intent. The allegations are that Springdale
4 acted hastily, improperly, failed to consult, attempted
5 to take back but was too late. Those are all
6 negligence-type allegations and not the deliberate
7 indifference standard that the Court in Hart looked at
8 and said at the time of the release of the document that
9 they knew what they were doing, that it was going to
10 cause harm. Those allegations do not appear in the
11 complaint.

12 I think the fact that the report was redacted
13 shows that Springdale went to the length that it does
14 with every such request that commingles exempt and
15 nonexempt information that redacted that information and
16 released it in compliance with the --

17 THE COURT: That's my point. Should the Court
18 engage in an analysis at this level as to the
19 sufficiency of the redacting?

20 MR. EICHMANN: I don't think the Court has to
21 because the complaint fails to allege that requisite
22 intent. And the fact that the complaint also alleges
23 that the report was redacted, it works together to show
24 that that intent did not look at.

25 I mean, I think had that been provided in the

1 complaint, had the police report been attached, then
2 that review could occur to see that the names were taken
3 out, to see that the agents were taken out, to see that
4 pronouns were taken out, to see that that type of
5 identifying information was there.

11:24AM

6 And by the way, the complaint points out that,
7 you know -- takes issue with the fact that Michelle and
8 Jim Bob Duggar's name appears in the document and that
9 way you can use it to identify, Michelle and Jim Bob

11:24AM

10 Duggar were the target of the FOI.

11 The subject of the FOI was Josh Duggar, Jim Bob
12 Duggar, and Michelle Duggar. That appears in the
13 complaint, so it's not surprising that if a person's FOI
14 for documents relating to those three people that those
15 three names are going to come back.

11:24AM

16 Again, the fact that a website was able to
17 sleuth using -- and this is -- obviously this is an
18 allegation; I have no idea whether this is true or not.
19 But whether the sleuth -- the length of the redaction to
20 be able to tell who the names were, you know, does not
21 go to show any type of deliberate indifference. That's
22 a -- that's a rarity that occurs because of celebrity.

11:24AM

23 THE COURT: All right. I'm going to give you
24 three or four more minutes to wrap up your part of the
25 presentation.

11:25AM

1 MR. EICHMANN: Your Honor, I'm -- and I
2 apologize for taking so much time, but I am at the end
3 at least of my argument except that, you know, even if
4 you -- you know, the component parts we discussed are
11:25AM 5 whether there's a violation of the underlying right, and
6 the plaintiffs' position is that -- the defendants'
7 position is that that culpability has not been -- has
8 not been met to establish a 1983 claim.

9 Secondly, the law between the -- that tension
11:25AM 10 between the FOI and the Child Maltreatment Act is not
11 clearly established; in fact, the opposite is true. The
12 law for 50 years has clearly established that the FOI
13 has preeminence and that exceptions are narrowly
14 construed.

11:25AM 15 And thirdly, that even if it was found as a
16 violation of right that it was clearly established that
17 O'Kelley and Cate acted objectively and reasonable in
18 releasing the report pursuant to an FOI that has
19 criminal penalties; and that has been, you know, such a
11:26AM 20 serious part of public life in Arkansas for 50 years.

21 So that concludes my part. I'll turn it over
22 to my colleagues.

23 THE COURT: All right. Mr. Kieklak, are you --

24 MR. KIEKLAK: Judge, what would you like to
11:26AM 25 hear? I'm prepared to talk about the liability, what

1 they call municipal liability, or would you like to
2 delve into courts or --

3 THE COURT: No, I want to flesh out all of the
4 bases of the defense motions as it relates to the
11:26AM 5 constitutional claims and, in particular, the immunities
6 that have been alleged. So let's go to the Washington
7 County defendant.

8 All right. Mr. Owens?

9 MR. OWENS: Thank your Honor.

11:27AM 10 I do represent Washington County and Rick Hoyt.
11 The Court mentioned that Steve Zega had also been named
12 as a defendant but only in his official capacity, which
13 is redundant of the claim against the county, of course,
14 and so on their behalf, I would make the following
11:27AM 15 arguments with respect to the constitutional claims.

16 The principle distinction between the
17 disclosure by the county as opposed to disclosure by the
18 city is that the county's exposure -- or the complaint
19 and concessions in the briefing -- pardon me --

11:27AM 20 respective to the motions to dismiss that the county's
21 disclosure came after the city's disclosure. The city's
22 disclosure was the one that was publicized by the Bauer
23 defendants in the publications thereafter.

24 That's very important, I think, for purposes of
11:27AM 25 our first argument, which is that this information, or

1 the vast majority of it, was already public by the time
2 that the County's disclosure was made.

3 In fact, in the response to the motion to
4 dismiss, the plaintiffs identify only one item of
11:28AM 5 information about the plaintiffs in this lawsuit. They
6 identify information about the parents and the brother,
7 who aren't plaintiffs in this lawsuit, but only one item
8 of information was allegedly disclosed by Washington
9 County for the first time.

11:28AM 10 Of course, on some level they can't -- the
11 complaint can't even speak to that because they allege a
12 leak occurred. They allege that the Bauer defendants
13 had some version of this report, perhaps an unredacted
14 version, before any of this ever happened. But to the
11:28AM 15 extent they do speak to that, the only item of
16 information is the age of one of the plaintiffs.

17 Of course, there's no case that has ever said
18 that -- or even hinted at the fact that a public
19 figure's age is somehow entitled to a constitutional
11:29AM 20 privacy right. The -- and that's the seminal question
21 for qualified immunity, of course, is could this
22 officer -- in this case Rick Hoyt, who's here today --
23 could he have been on reasonable notice that what he was
24 disclosing -- and I would echo what Mr. Eichmann said
11:29AM 25 about pursuant to the preeminent disclosure statute in

1 the State of Arkansas, which used to be liberally
2 construed, exemptions to be narrowly construed and, most
3 importantly, under threat of criminal prosecution.

4 This is one of the few, if not the only --

11:29AM

5 well, one of the few duties, I'll say, of public
6 officials in the State of Arkansas that is done under
7 the threat of criminal prosecution. There's no criminal
8 prosecution -- and it's unilateral criminal prosecution.
9 So it's only criminal prosecution if you fail to

11:30AM

10 disclose something that should have been disclosed, not
11 the other way.

12 And so the public official is faced with the
13 prospect of, I've either -- in this case, even if these
14 lawyers had come in and talked to Major Hoyt two days
15 before he made this disclosure, he would have had to
16 weigh, "Well, do I disclose based on what I think about
17 the FOIA and all the other law in the State of Arkansas
18 and beyond, do I disclose and face a lawsuit, or do I
19 not disclose and face criminal prosecution."

11:30AM

20 I would posit that the Constitution doesn't
21 require such a Hobson's choice of public officials. But
22 brings me back to, the information was already public.
23 The only information that they allege the Washington
24 County defendants newly disclosed was the age of one the
25 other plaintiffs. Certainly the other plaintiffs

11:31AM

1 couldn't rely on that to assert a claim and so there is
2 some distinction between the plaintiffs' claims in this
3 matter0.

11:31AM

4 THE COURT: What was the timing on the 20th and
5 21st? May I --

11:31AM

6 MR. OWENS: My recollection from the complaint
7 is that the City disclosed one day, but my recollection
8 is that they disclosed by e-mail and then the County put
9 it in the U.S. mail, snail mail, the next day and that
10 the Bauer defendants utilized and posted the Springdale
11 defendants' disclosure.

11:31AM

12 I don't know if there's an allegation in the
13 complaint about whether they then publicized the
14 Washington County defendants, but I don't -- disclosure,
15 but I don't believe that there is, and they can tell me
16 if I'm wrong. I'm sure they will.

11:32AM

17 But it gets back to what is the specific -- and
18 part of that is the burden of proof issue that --
19 particularly at this stage of the proceedings. This is
20 a motion to dismiss. Everything they claim has got to
21 be deemed true, whether it is or not, by the Court, and
22 the Court's got to give all reasonable inferences.

11:32AM

23 But this case is all about the disclosure of
24 information. That's the allegation. If you boil it
25 down to one sentence, the allegation is, at least as

1 against the public entities, the disclosure of
2 information violated the right of privacy.

3 Under those allegations, whatever category they
4 want to state them -- state tort, constitutional claim,
11:32AM 5 whatever -- you have to clearly delineate what
6 information was disclosed to carry the day; and to the
7 extent they do that as against Washington County, it's
8 only this age issue. All the rest relates to other
9 nonparties or was already disclosed.

11:33AM 10 And, of course, we said in our motion -- and I
11 don't think there's any case law that would refute this
12 notion -- and it's the notion that once private matters
13 have been publicly disclosed, the privacy right
14 evaporates completely about that item of information.

11:33AM 15 THE COURT: What if it was confidential
16 information?

17 MR. OWENS: Well --

18 THE COURT: Under a pledge of confidentiality?

19 MR. OWENS: Right. And you asked Mr. Eichmann
11:33AM 20 about that. My response to that is I don't believe
21 there's any such thing as constructive knowledge for
22 purposes of constitutional claims, by agency is what I
23 mean.

24 So --

11:33AM 25 THE COURT: Well, how does this information get

1 in the county's incident report without knowledge that
2 it was obtained pursuant to a pledge of confidentiality?

3 MR. OWENS: I can't speak to that. I just
4 don't know. The complaint certainly doesn't allege
11:34AM 5 anything about that question. The -- and there's no
6 allegation that Mr. Hoyt knew about that.

7 THE COURT: Well, did Washington County
8 employees participate in the investigation of child
9 abuse?

10 MR. OWENS: That's the allegation in the
11 complaint, that Washington County employees,
12 investigators, did.

13 THE COURT: And was the --

14 MR. OWENS: No allegation that Major Hoyt was
11:34AM 15 present.

16 THE COURT: Well, I understand that, but do you
17 concede that the complaint says that during the course
18 of the investigation, investigators obtained statements
19 from the minors under a pledge of confidentiality?

11:34AM 20 MR. OWENS: Yes, and it says something very
21 similar to that in Paragraph 2, which you read into the
22 record.

23 THE COURT: All right. So nine years later,
24 one of the investigating authorities releases --

11:35AM 25 MR. OWENS: Right.

1 THE COURT: -- this information that had
2 been -- I'm talking about what's alleged in the
3 complaint.

4 MR. OWENS: Right.

11:35AM

5 THE COURT: -- releases information that had
6 been obtained from a minor under a pledge of
7 confidentiality.

11:35AM

8 A, does it matter that Major Hoyt, at the time
9 that he released it, was unaware of it; B, does it
10 matter at this stage of the proceedings; and C, assuming
11 that we get past one and two, do you not agree that that
12 was a clearly established -- that would be a clearly
13 established constitutional violation as of the point in
14 time when the release of information was made?

11:36AM

15 MR. OWENS: Well, let me respond to the first
16 two. Does it matter that Hoyt didn't know? And there's
17 no allegation that Hoyt knew -- and it's our position
18 that the complaint is required to say he knew if he
19 knew, if that's the allegation -- and I believe it
20 doesn't say it because he didn't know. There's
21 certainly no proof to that effect; I think that's what
22 he'll say.

11:36AM

23 But, yes, it matters. It matters very much
24 because there's no vicarious liability under Section
25 1983. Section 1983, the actual language of Section 1983

11:36AM

1 says that liability attaches when a person subjects
2 another person to the deprivation of his constitutional
3 rights, not when a person who coulda/woulda/shoulda
4 known that another person did something earlier; and had
5 he known, then -- there's no vicarious liability.

6 I'm normally in front of this court on
7 deliberate --

8 THE COURT: Well, it's not a matter of
9 vicarious liability. It's a matter of vicarious
10 knowledge.

11 MR. OWENS: Constructive knowledge.

12 THE COURT: Constructive knowledge, yes.

13 MR. OWENS: By being employed by the same
14 entity ten years apart. There's no basis for that kind
15 of liability in the case law, I would submit. In fact,
16 I think the case law stands for the opposite
17 proposition. If you read the deliberate indifference
18 cases over and over again --

19 THE COURT: But isn't that a Rule 56 issue?

20 MR. OWENS: I don't think so. I don't think it
21 is, your Honor, because if you look at deliberate
22 indifference cases as an example -- and the deliberate
23 indifference standard is cited by the Eighth Circuit in
24 these cases.

25 It's not a question of, "Well, one guy on the

1 jail staff knew and we sued everybody else." That's not
2 good enough. You've got to show that the person who
3 disregarded the risk actually knew.

4 That's at the core of these kinds of cases
11:37AM 5 because it doesn't allow that kind of constructive
6 knowledge. It has to be you as the public officer
7 personally that subjects this in order for individual
8 liability to attach.

9 Now, would that give rise to municipal or
11:38AM 10 county liability? That's a different question. But as
11 to individual liability, I don't believe there's any
12 case that suggests that constructive knowledge by agency
13 is sufficient to establish the link that the plaintiffs
14 want to try to establish. In fact, I think the case law
11:38AM 15 is uniformly against that proposition and so I do think
16 it's the Court's obligation at this point to make that
17 finding and find in favor of our motion to dismiss.

18 The third question was? I'm sorry.

19 THE COURT: Well, I think the third question
11:38AM 20 was the stage, whether it makes a difference at this
21 stage or whether it should be a Rule 56 issue.

22 MR. OWENS: I do think it makes a difference.
23 Now, if the Court sees fit to allow the plaintiff to
24 amend to say that Hoyt knew, if they think he knew?

11:39AM 25 THE COURT: I'm sorry. The third question was

1 do you concede that the release of -- or the breach of a
2 pledge of confidentiality is a constitutional violation
3 that was clearly established prior to 2015.

4 MR. OWENS: My recollection in that case -- I
11:39AM 5 don't have it in front of me, but my recollection of
6 that case is that that's one of the factors, that it's
7 important to a consideration, but it's not the only
8 factor.

9 Of course, confidentiality, in this case these
11:39AM 10 folks were being, according to the complaint,
11 interviewed by criminal investigators. I mean, on some
12 level that's happening for a reason, presumably with an
13 eye on criminal prosecution; and in order for there to
14 be a criminal prosecution, somebody would have to be
11:40AM 15 notified.

16 And so there is some vagueness there, despite
17 the allegations; and, of course, the allegations are all
18 made against nonparties, at least with respect to
19 Washington County. These investigators have not been
11:40AM 20 sued, and I don't even know if they were still employed
21 at the time of the disclosure.

22 But I think it's a -- I think it's a factor. I
23 don't think it conclusively establishes one way or the
24 other is my recollection of the case.

11:40AM 25 THE COURT: Well, are the plaintiffs entitled

1 to discovery to determine the extent to which the files
2 were marked confidential or pledge of confidentiality
3 had been given, "Do not further disclose," something
4 like that?

11:40AM

5 MR. OWENS: Well, if they had alleged that, if
6 they had alleged that Rick Hoyt knew, before he
7 disclosed these, that these things were to be held
8 confidential, whatever that means in the context of a
9 criminal investigation, which is aimed at something --

11:41AM

10 and presumably the prosecutor's going to see this one
11 way or the other no matter what happens in those
12 interviews -- and is that confidential? I don't know
13 what the primus was, if there was one.

11:41AM

14 But -- now, I think they have got to allege it
15 to get to discovery, and they haven't alleged it, and I
16 don't think they can allege it. I don't think there's
17 any indication of that. I think -- I just don't
18 think -- I don't think there's any basis for them to
19 make that allegation.

11:41AM

20 And that's one of the things that separates
21 this case from the cases they've cited in their
22 briefing. The cases they've cited in their briefing are
23 cases where personal animus and retaliation are right on
24 the surface.

11:41AM

25 The only circuit case that they cite, the Ribar

1 case out of the Sixth Circuit, in that case the privacy
2 claim was dismissed on the basis of qualified immunity
3 because the law was unsettled. The only thing that went
4 forward was a retaliation claim, which we don't have in
5 this case. That's pretty illustrative of the cases they
6 cite entirely.

7 It's simply a different matter when a public
8 officer takes it into his hands to retaliate against
9 someone by disclosing information. It's a different
10 matter; it's a different cause of action than this right
11 of privacy cause, as determined by the Court in Ribar.

12 We don't have any allegations of that because
13 it didn't happen. We don't have any allegations of
14 retaliation because it didn't happen. It just wasn't
15 part of this.

16 Instead, these were public officers, in good
17 faith, responding under a statute in which they have
18 been told to liberally construe and narrowly construe
19 exceptions and been told they will be prosecuted if they
20 don't disclose. No FOI cases in Arkansas cited for the
21 proposition that an FOI disclosure of any sort violates
22 a right of privacy, much less in the specific context of
23 this case in order to put this officer on reasonable
24 notice.

25 There's also -- speak to these state law

1 allegations that really seems to be the core and the
2 impetus for this suit is that somehow these disclosures
3 violated state law, and I'll speak to each of them in
4 turn briefly.

11:43AM

5 First of all, the Child Maltreatment Act
6 relates only to records of the arrest, detention of a
7 juvenile or proceedings under the sub chapter.

11:44AM

8 Tellingly, this statute was amended. That's why we've
9 called it "Josh's Law." It was amended to deal with
10 this specific circumstance after all this occurred,
11 which just tells you all you need to know about the
12 status of the law.

11:44AM

13 It wasn't only unsettled; it went in the
14 opposite direction. It was clear to the legislature at
15 least that they needed to do something to amend this
16 law -- and that's 9-27-309 -- to add in this proviso
17 about an adult relating to an offense when he was a
18 juvenile. That part was revised, amended, and added
19 after -- after all this happened. That tells you all
20 you need to know, I think, about the state of the
21 Arkansas law on that point.

11:44AM

22 The -- and I'm sorry. I called it the Child
23 Maltreatment Act. That's 9-27-309. I may have my Child
24 Maltreatment Act and Juvenile Code mixed up, but it's
25 9-27-309 is that statute.

11:45AM

1 12-18-104, the confidentiality statute they
2 cite to, is just missing a clause. It just is. There's
3 no "related to" or "regarding" clause in 12-18-104(a).
4 Instead, it says, quote: "Any data, records, reports,
5 or documents that are created, collected, or compiled by
6 or on behalf of."

7 Now, to my reading that's every document in the
8 possession of the entities that come in the list after
9 this, which is Department of Human Services, state
10 police, or any other entity organized under this chapter
11 to perform investigations or provide services to
12 children, individuals, or families.

13 If -- it's a little easier to read if you,
14 instead of the list, just focus on one of those. Let's
15 focus on the Department of State Police. Then this act
16 reads, 12-18-104(a) reads: Any data, records, reports,
17 or documents that are created, collected, or compiled by
18 or on behalf of the Arkansas State Police shall not be
19 subject to disclosure under the Freedom of Information
20 Act of 1967.

21 So it does work in absurdity. It repeals the
22 FOIA if you take it at face value. Now, if this Court
23 wants to rule that the FOIA has been repealed by this
24 legislation, you know, I'm sure my other 54 counties
25 would be happy to hear about that.

1 I don't think that's the case, and I don't
2 think this statute should even be read that way. It's
3 missing a clause and so we don't know what the scope of
4 this is or was intended to be. There's no way this
5 statute could have put anybody on reasonable notice by
6 not disclosing this particular type of information,
7 particularly in Washington County's case where we're
8 talking about the age of one public figure.

9 16-90-1104, nondisclosure of information about
10 a victim, is also problematic because it's hopelessly
11 circular. In subsection (b), it says a law enforcement
12 agency shall not disclose to the public information,
13 directly or indirectly, identifying the victim of a sex
14 offense.

15 Number one, we didn't have a sex offense here.
16 There was no conviction, ever, not even a charge, in
17 fact. There was an allegation. I don't think that
18 constitutes a sex offense under this subchapter.

19 Except to the extent that disclosure is -- and
20 subsection 2 says "required by law." So the statute
21 says some of this information that may or may not be the
22 information we're talking about in this case should be
23 disclosed -- should not be disclosed; in other words,
24 there's an exemption to the FOI -- unless it's required
25 by law to be disclosed.

1 Well, the FOI presumptively requires all public
2 records to be subject to disclosure. And so you've got
3 this hopelessly circular legislation, at most, that
4 somebody would have to deal with.

11:48AM

5 Of course, all of these are outside the four
6 corners of the FOIA, in other areas of the code, in
7 disparate areas of the code, follow 9, 12, and 16
8 respectively.

11:48AM

9 No case has ever found that records should not
10 have been disclosed even under those subsections. So
11 there's been no interpretive case law on those points,
12 certainly none cited in this case.

11:48AM

13 I've spoken to the information about nonparties
14 and disclosures. There's also this question about
15 policy and custom with respect to county liability on
16 these constitutional claims. There's just been no
17 allegation of municipal policy or custom on the county's
18 part that this ever happened before or since or that,
19 you know, anyone ever complained about these specific
20 issues before or since without those allegations.

11:49AM

21 Without allegation of a policy, there can't be any
22 county liability on these constitutional claims.

11:49AM

23 And on a final point I would add, I don't think
24 I've heard an argument about this, but I think the
25 Arkansas law is fairly clear that the Arkansas

1 constitutional claims should be analyzed in exactly the
2 same manner as the federal claim. I don't think there
3 was a contrary response on that point.

4 THE COURT: All right. Thank you, Mr. Owens.

11:49AM

5 Mr. Kieklak, I think I'm going to go over to
6 the plaintiffs and ask Mr. Bledsoe to respond. If --

7 MR. KIEKLAK: Yes, sir.

8 THE COURT: -- he invokes something about
9 Monell claims that you disagree with, I'll give you a
10 chance to respond.

11:49AM

11 MR. KIEKLAK: Yes, sir.

12 THE COURT: Mr. Bledsoe?

13 MR. BLEDSOE: Thank you, your Honor. I'm
14 delighted to be in your courtroom today. I have not
15 been to Arkansas before.

11:50AM

16 THE COURT: Well, we're glad to have you.

17 MR. BLEDSOE: Didn't even know the University
18 of Arkansas was in Fayetteville, although I was a big
19 fan of the Arkansas basketball team. I think it was in
20 the early Nineties, when they won at least one national
21 championship.

11:50AM

22 One thing I wanted to do is to introduce myself
23 briefly, and also just let the Court know -- because I
24 saw some other members refer to each other by first name
25 and appear to be on a first-name basis with your Honor,

11:50AM

1 certainly not within the courtroom.

2 I've been practicing law for 26 years in Los
3 Angeles. I'm a defense lawyer, spent my entire career,
4 until very recently, at a large national firm doing
11:50AM 5 defense work. I'm not used to sitting on this side of
6 the table.

7 A group of us, including -- Mr. Larson, is a
8 former federal judge, Robert Larson is a federal Bush
9 appointee -- left a national firm a couple years ago,
11:51AM 10 started our own firm, had more freedom to do the type of
11 cases we wanted to handle. This is the type of case we
12 want to handle. I still do primarily defense work, but
13 I found this case particularly compelling.

14 And just one last thing I want to mention. I
11:51AM 15 know the Court addressed me first as plaintiffs'
16 counsel. Shawn Daniels is not my local counsel. Shawn
17 Daniels and Hare Wynn are cocounsel in this case. Both
18 firms, both were all in on this case and that's why I
19 came out from California to do this argument. But there
11:51AM 20 may be occasions when I'm not here and that's not
21 because I'm deferring to local counsel. Mr. Daniels
22 stands shoulder to shoulder with our firm and me on this
23 case.

24 There is a well-known judge in the Central
11:52AM 25 District, Judge Lew, who, when you appear before him,

1 typically asks you, "Counsel, do you have anything to
2 say that's not in your papers?" And if you say yes,
3 then he says, "Well, why wasn't that in your papers."
4 So at this point I don't think we have a lot to say.

11:52AM

5 I'll make a brief argument, but our papers have
6 addressed all of the issues, I believe, that the defense
7 has raised.

8 I did make a few notes on the plane yesterday.

11:52AM

9 I do have a few thoughts on this case. First, I'm
10 appalled, appalled by the conduct in the City and the
11 County. Despite my youthful good looks, I have a
12 daughter and I have a granddaughter. I'll tell ya,
13 there's no greater violation -- other than committing
14 the sexual assault yourself, there's no greater

11:53AM

15 violation you can do to a young person -- in this case
16 four beautiful, innocent, sweet, young girls -- than to
17 broadcast the details of their sexual assault to the
18 world in this case.

19 This wasn't -- this was a known disclosure to
20 tabloids concerning the sexual assaults committed on
21 four sweet, innocent girls when they were minors, which
22 they only disclosed under a promise of confidentiality.
23 No right-thinking person would do such a thing.

11:53AM

24 THE COURT: Do you believe that the City and
25 County defendants believed that they were under a duty

11:53AM

1 to disclose this information --

2 MR. BLEDSOE: I think --

3 THE COURT: -- or do you believe there's
4 something more nefarious about it?

11:54AM 5 MR. BLEDSOE: We've alleged there's something
6 more nefarious about it. I think Police Chief Cate
7 seemed to have a relationship with the plaintiffs' firm.
8 There were e-mails going back and forth. There seemed
9 to be -- I don't know if it was jealousy; I don't know
11:54AM 10 if it was spite. We don't know. We haven't taken the
11 discovery yet, but there was something going -- there
12 was a rush to get this information out to the tabloids,
13 and it smacks of intentional conduct or at least
14 deliberate indifference.

11:54AM 15 THE COURT: Well, they certainly have certain
16 duties to comply with FOIA, correct?

17 MR. BLEDSOE: Sure, and we --

18 THE COURT: So where did they go astray?

19 MR. BLEDSOE: Well, counsel for the county
11:54AM 20 pointed to the language of the Child Maltreatment Act,
21 specifically Arkansas Annotated Code 12-18-104, and said
22 if you read it broadly, it eviscerates FOIA. Well, what
23 he didn't indicate is this statute, which protects all
24 records, is limited to records under the Child
11:55AM 25 Maltreatment Act. This statute specifically protects

1 children and ends with "shall not be subject to
2 disclosure under the Freedom of Information Act."

3 There's no clause missing. It's a statute
4 protecting children and information concerning children,
11:55AM 5 particularly children who are victims of sexual assault.
6 And there's other statutes protecting victims of sexual
7 offenses, victims of sexual assault.

8 I don't know how it could be any more clear,
9 frankly.

11:55AM 10 THE COURT: The entirety of the document is
11 protected? Is that -- is that your point, or are you
12 suggesting that they did not conduct sufficient
13 redacting?

14 MR. BLEDSOE: Well, in this case I think the
11:56AM 15 term "redaction" is charitable because there appear -- I
16 think the entire document was protected because it was a
17 document under the Child Maltreatment Act.

18 There was a, at most, halfhearted, indifferent
19 effort to redact, where anybody who knew anything about
11:56AM 20 the family -- and this was going to the tabloids --
21 could figure out, by reading the document, who was
22 involved.

23 And there's been an argument that the
24 information was already made public. Well, that's
11:56AM 25 false, and we've explained in our briefing that's false.

1 There was information in the public that Josh Duggar
2 was -- or had been investigated concerning allegations
3 of a sexual assault. There was nothing public about who
4 was involved. Could have been a third-party nonfamily
5 member.

11:57AM

6 The City and the County were at least specific
7 information with redactions that were effectively
8 meaningless under the circumstances because the
9 information released by the City allowed anyone who knew
10 anything about the situation to identify the victims.

11:57AM

11 The County piled on, released the same
12 information, I believe, before In Touch magazine
13 published it. But the County held on and identified the
14 specific age of one of the victims, as well as providing
15 the other information that had been obtained.

11:57AM

16 So, you know, if you're Joy Duggar, that was a
17 meaningful disclosure. If you're these other girls,
18 those were meaningful disclosures which were
19 humiliating, which were embarrassing, which put -- I
20 mean, put a Scarlet Letter on them almost.

11:58AM

21 The rest of their lives, these girls, people
22 look at them and say, "Oh, yeah. She was the one
23 molested by her brother." It's despicable what happened
24 here and, you know, we -- I almost prefer to save most
25 of my argument for summary judgment because what we've

11:58AM

1 heard here are effectively summary judgment-type
2 arguments.

3 The standard on a motion to dismiss is the
4 dismissal is inappropriate unless it appears beyond
11:58AM 5 doubt that the plaintiffs can prove no set of facts in
6 support of their claims which would entitle them for
7 relief. We have an extremely detailed complaint which
8 sets forth facts which we believe entitle these
9 beautiful, sweet girls to relief, and we've pled those
11:59AM 10 facts sufficiently.

11 And unless the Court has other specific
12 questions, I would reserve my argument for plaintiffs to
13 have more argument, or really, frankly for summary
14 judgment because that's what the type of arguments that
11:59AM 15 we have been faced this morning.

16 THE COURT: Well, the defendants contend that
17 to the extent that you have stated facts from which the
18 Court can construe that there was a violation of a
19 constitutional right that it wasn't clearly established
11:59AM 20 in this circuit that that set of facts would constitute
21 something of a constitutional dimension. What is your
22 response to that?

23 MR. BLEDSOE: Your Honor, I read their briefs
24 yesterday, flying right over them. I made note I could
12:00PM 25 hardly believe what I was reading. This is the City's

1 brief; the County basically parroted it.

2 Page 8, third paragraph starts, "The protection
3 against public dissemination of information is limited
4 and extends only to highly personal matters,
12:00PM 5 representing the most intimate aspects of human affairs.
6 To violate a person's constitutional right of privacy,
7 the information disclosed must either be a shocking
8 degradation or an egregious humiliation to further some
9 specific state interest or a flagrant breach of a pledge
12:00PM 10 of confidentiality which was instrumental in obtaining
11 the personal information."

12 I wrote down in the margin exactly what
13 happened here. There are statute -- it's hard to
14 conceive of more personal, more intimate, more violative
12:01PM 15 disclosures than to disclose not only the identity of
16 minors who are victims of sexual assaults but to
17 disclose the details of those sexual assaults.

18 THE COURT: Defendants say they didn't disclose
19 any identities.

12:01PM 20 MR. BLEDSOE: Well, they did. They didn't say
21 the names, but they disclosed pages and pages of
22 information that a reader could figure out who they
23 were.

24 With respect to Joy Duggar, they did disclose
12:01PM 25 her age at the time so that anybody could figure out

1 and, in fact, people on the Internet did identify the
2 victims and that's --

3 THE COURT: So if you are employed by a county
4 or local government and you're tasked with complying
12:02PM 5 with FOIA requests, do you have one set of rules for
6 high-profile -- people who are mentioned of high-profile
7 and public records and then have a different set for
8 people who are not high-profile?

9 MR. BLEDSOE: That's not what we're saying.
12:02PM 10 But I'll tell you, that distinction is lost if you're
11 one of those poor girls.

12 What I'm saying is you cannot release
13 information which identifies the victim of a sexual
14 assault. The identity of these girls was released.
12:02PM 15 Information sufficient to identify them was released,
16 and there are statutes directly on point.

17 I've read -- I've read one. You can't release
18 information sufficient to identify the victim of a
19 sexual assault, and you can't release records relating
12:03PM 20 to the minor victims of a sexual assault.

21 So we're not saying -- the distinction is
22 without a difference if you're one of the four girls and
23 the County releases information sufficient to identify
24 you. Granted, they did not release the names of the
12:03PM 25 girls, but they released pages of information which was

1 sufficient for not just the public at large but anyone
2 in the community and that's why it doesn't matter if
3 you're famous or not famous.

12:04PM 4 Members in this community who knew the Duggar
5 family, irrespective of any publicity, could identify
6 them from the records that were released and that's why
7 we're not making an argument that the City or the County
8 should be held to a different standard because the
9 Duggars, you know, had a TV show -- or have a TV show.

12:04PM 10 I will say, though, that anyone should have
11 known the records of children who report details of
12 their sexual assault are confidential under the law, and
13 there's multiple statutes covering that.

12:04PM 14 This was not something that was difficult to
15 figure out, and the statute specifically exempts those
16 records from disclosure under FOIA.

17 I don't think -- you know, this weighing FOIA
18 versus weighing -- there's a statute directly on point.
19 No weighing had to be done. The law was clearly
12:05PM 20 established. It can't be more clearly established than
21 to say "are not subject to disclosure under FOIA."

22 THE COURT: All right. What about official
23 policies or unofficial customs of the City or the
24 County?

12:05PM 25 MR. BLEDSOE: We've addressed that in our

1 briefing, but at this point -- we've addressed that in
2 our briefing sufficiently, we believe, to get past the
3 motion to dismiss. That's going to be a subject of
4 discovery because either they had policies in place
12:05PM 5 which they followed, which were a problem, or they
6 didn't have policies in place, which, they should have.
7 And so that's really -- that's really to be subject of
8 discovery. We've cited, I think, case law that confirms
9 that at this stage.

12:05PM 10 THE COURT: Where does your complaint state
11 these allegations sufficient to survive a plausibility
12 test?

13 MR. BLEDSOE: Let me just go back to my
14 argument. I believe it's complaint paragraph 141. The
12:06PM 15 plaintiffs allege that the City and County maintain
16 policies and practices that permitted the improper
17 release of information obtained under a promise of
18 confidentiality.

19 In addition the plaintiffs allege that the City
12:06PM 20 and County failed to implement a policy concerning
21 consultation which juvenile services, family services or
22 other departments prior to releasing information which
23 would have protected plaintiffs from the improper
24 disclosure.

12:06PM 25 And I'll just notice the Eighth Circuit

1 recognized in Doe versus School District of Norfolk, a
2 plaintiff at the pleading stage may not be privy to the
3 facts necessary to accurately describe or identify any
4 policies or customs which may have caused the
5 deprivation of a constitutional right; thus, under
6 Eighth Circuit law, a plaintiff need not specifically
7 plead the existence of an unconstitutional policy or
8 custom to survive a motion to dismiss. And that's --

9 THE COURT: All right. So it's paragraphs 141
10 and, by extension, 142, and that's it?

11 MR. BLEDSOE: Yes, your Honor.

12 THE COURT: Anything else you'd like to add?

13 MR. BLEDSOE: No. No, your Honor. Thank you.

14 THE COURT: All right. Thank you.

15 Let's shift over now and let's take up the tort
16 claims. I understand that -- Ms. Kendall, were you
17 going to take up that issue?

18 MS. KENDALL: Yes, your Honor.

19 THE COURT: You may proceed.

20 MS. KENDALL: Okay.

21 Morning, your Honor. Susan Kendall on behalf
22 of Springdale defendants.

23 I guess that I'll begin with the intrusion upon
24 seclusion, if that's acceptable with the Court, and
25 there's a few different arguments with respect to the

1 tort claims. One is under Rule 12(b)(6), the plaintiffs
2 have simply failed to allege facts sufficient to support
3 a claim; it must be dismissed.

4 On the intrusion upon seclusion, one of the
12:08PM 5 elements on there is that the defendants intentionally
6 intruded and that they had to believe or were
7 substantially certain that they lacked the necessary
8 legal authority or permission to do so; and, your Honor,
9 there are no allegations in the complaint that the City
12:08PM 10 of Springdale, Chief O'Kelley or Ernest Cate believed,
11 or that they were substantially certain, that they
12 lacked the necessary authority or permission to release
13 the redacted police report pursuant to FOIA.

14 There are -- Paragraphs 46 through 57 of the
12:09PM 15 plaintiffs' complaint even specifically reference the
16 fact that the plaintiffs were -- excuse me, that the
17 defendants were releasing the police reports pursuant to
18 FOIA.

19 The standard under intrusion upon seclusion is
12:09PM 20 not whether they knew or should have known. It's
21 whether they believed or were substantially certain; and
22 in this case, the plaintiffs had made the allegation
23 that the plaintiffs knew or should have known. That's a
24 negligence standard, your Honor.

12:09PM 25 What this boils down to is that the plaintiffs

1 have complained that the Springdale defendants have
2 negligently released a police report pursuant to FOIA.
3 There's not an intentional element claimed that they
4 believed or were substantially certain.

12:10PM

5 And, your Honor, if I could segue for just a
6 minute, there's been a lot of talk about the Child
7 Maltreatment Act and whether -- excuse me -- the
8 Springdale police record, police report, was a record
9 under the Arkansas Child Maltreatment Act.

12:10PM

10 The Arkansas Child Maltreatment Act is not an
11 act pertaining to criminal investigations. It's an
12 administrative act. What the Arkansas Child
13 Maltreatment Act does is it sets up the hotline, the
14 child reporting hotline, child abuse reporting hotline;
15 and there are two entities, two agencies, that are
16 charged with that. That is the Arkansas State Police
17 Crimes Against Children division and the Department of
18 Human Services.

12:10PM

19 So what happens is there's a report that comes
20 through the hotline; and under the Child Maltreatment
21 Act, one of those two agencies are charged with
22 investigation of that report. And there is an agreement
23 that's entered into every year between these two
24 agencies, and they determine who's going to investigate
25 this report.

12:11PM

1 This is not a criminal investigation. Child
2 Maltreatment Act is not a criminal investigation
3 statute. Now, the Child Maltreatment Act encourages
4 cooperation with law enforcement; it doesn't authorize
12:11PM 5 law enforcement to conduct criminal investigations that
6 come in. Under 12-18-102, the Child Maltreatment Act
7 says it encourages cooperation with law enforcement; it
8 does not authorize law enforcement to conduct these
9 investigations.

12:11PM 10 So what happens under the Child Maltreatment
11 Act is hotline report comes in; they're set into two
12 different priorities, priority one and priority two.
13 Priority one goes to the Crimes Against Children
14 division of the Arkansas State Police. They are the
12:12PM 15 more severe allegations. Priority two goes through the
16 Arkansas Department of Human Services.

17 Depending on the priority, one of those two
18 agencies is granted the authority and the obligation,
19 under the Child Maltreatment Act, to conduct an
12:12PM 20 investigation. The investigation that's conducted by
21 the Arkansas State Police, the Crimes Against Children
22 division, is actually done by civilians. It's not a
23 criminal investigation.

24 If the allegation is severe enough, at that
12:12PM 25 point the civilian staff of the Crimes Against Children

1 refers that to local law enforcement for local law
2 enforcement to determine how they want to proceed.
3 They're not required to proceed with an investigation
4 and that is a criminal investigation outside of the
5 Child Maltreatment Act.

12:12PM

6 So we go back into the Child Maltreatment Act.
7 So it's severe enough, Child Maltreatment -- or, excuse
8 me, CAC refers that out to law enforcement for criminal
9 investigation.

12:13PM

10 THE COURT: Ms. Kendall, I --

11 MS. KENDALL: Yes, sir.

12 THE COURT: I understand what you're saying.
13 What I don't understand procedurally is whether that is
14 an issue that we take up on the pleadings or whether
15 it's an issue that we have to wait until there's some
16 discovery and it comes back up on Rule 56.

12:13PM

17 What I think that we're here on is, to the
18 extent that you are contending that any of the tort
19 claims are barred by immunity, I'd like to hear about
20 that.

12:13PM

21 MS. KENDALL: Sure.

22 THE COURT: And to the extent that you
23 contend -- and this may be kind of what you were getting
24 at -- that there's a pleading sufficiency under
25 12(b)(6), and we can talk about that.

12:13PM

1 MS. KENDALL: Sure.

2 THE COURT: But I think where you're going is a
3 little bit beyond simply accepting the facts as stated
4 as true, which is -- the Court is bound by that at this
5 stage.

12:14PM

6 MS. KENDALL: Sure. And I appreciate that,
7 your Honor, and I'll move forward.

8 THE COURT: Why don't we start with immunity.
9 Are there any -- do you believe there are any immunity
10 issues that --

12:14PM

11 MS. KENDALL: Well, I do think to the extent
12 that the Court was focusing on earlier, on whether it
13 was relevant or not that the state police investigator
14 with the Crimes Against Children division of the State
15 police, who was a civilian, made a promise of
16 confidential. That was a promise of confidentiality
17 made in a Child Maltreatment Act investigation. The
18 City of Springdale was not involved in the Child
19 Maltreatment Act investigation. They were conducting a
20 criminal investigation.

12:14PM

21 So to that extent -- and I apologize if I got
22 too bogged down in the weeds, your Honor.

23 THE COURT: That's all right.

24 MS. KENDALL: That's what I was trying to get
25 to very quickly is any promises of confidentiality were

12:14PM

1 made in a child maltreatment investigation. City of
2 Springdale was conducting a criminal investigation.

3 Now, while there may be some overlap between
4 the two, our report was a report of a police report,
12:15PM 5 criminal investigation police report. And so that goes
6 back to we could not have believed or were substantially
7 certain that we lacked the necessary authority or
8 permission to do so because it was a closed criminal
9 police investigation; and under FOIA, it's clear that
12:15PM 10 those are subject to FOIA; and when minors are involved,
11 we simply redact.

12 So in going back to the -- excuse me. I
13 apologize, your Honor. Going back to the intrusion upon
14 seclusion claim, they could not have believed or been
12:15PM 15 substantially certain that they lacked the necessary
16 legal authority to do so, so they have not been able to
17 meet their element of intrusion upon seclusion, which is
18 somewhat commingled with the fact that when they don't
19 have that necessary requisite intent, they are entitled
12:16PM 20 to qualified immunity.

21 Moving on -- and, your Honor, I'm happy to move
22 on to the immunity issue. It's a bit muddled in
23 Arkansas when it comes to statutory immunity and
24 qualified immunity with respect to intentional torts.

12:16PM 25 THE COURT: Well, let's start with this

1 proposition.

2 MS. KENDALL: Sure.

3 THE COURT: Do we agree that your two invasion
4 of privacy claims and your outrage claim are all
12:16PM 5 intentional torts?

6 MS. KENDALL: Yes, sir.

7 THE COURT: And do we agree that statutory --
8 Arkansas statutory immunity does not apply to
9 intentional torts?

12:16PM 10 MS. KENDALL: I apologize. What was that, your
11 Honor?

12 THE COURT: Do you concede that Arkansas
13 statutory immunity does not apply to intentional torts?

14 MS. KENDALL: I can't concede to that, your
12:16PM 15 Honor, and I think there's a lengthy analysis in our
16 brief. I think at best, the law in Arkansas is
17 completely unclear as to whether it applies or not.

18 In the most recent cases that have come out of
19 the Arkansas --

12:17PM 20 THE COURT: What about --

21 MS. KENDALL: Yes, sir.

22 THE COURT: -- the '92 case as of Deitsch
23 versus Tillery, which was, in effect, ratified again by
24 the Supreme Court in Trammell versus Wright last year?

12:17PM 25 MS. KENDALL: Correct, your Honor. And in

1 Trammell actually -- the Court did not decide that issue
2 in Trammell. The argument was made in Trammell, and the
3 Court said we're going to decide -- what they ruled in
4 that case, it was a false arrest case and they ruled in
5 that case that it was a negligent act and not an
6 intentional act and so for that point, they did not get
7 into an analysis of whether the intentional -- statutory
8 immunity applied to intentional torts or not.

9 THE COURT: Where has the Arkansas Supreme
10 Court ever left any gray area --

11 MS. KENDALL: Sure.

12 THE COURT: -- as to the point of statutory
13 immunity does not apply to intentional acts?

14 MS. KENDALL: Sure. So, your Honor, the
15 landmark case that seemed to have come out with the
16 proposition that statutory immunity only applies to
17 negligence claims is this Battle case that came out in
18 1989. If you look at the plain language of the statute
19 or immunities statute, it has no limitations. It simply
20 says that counties, municipal corporations, and so on
21 shall be immune from liability and from suit for damages
22 except to the extent that they may be covered by
23 liability insurance. There's no limiting language with
24 respect to tort of intentional torts or negligent torts.

25 Conversely, if you look at the claims against

1 the state, it's specifically limited, where there is
2 tort immunity for acts or omissions other than malicious
3 acts or omissions.

4 So just the plain language, the plain reading
12:18PM 5 of the statute indicates that the tort immunity for
6 cities is not limited solely to negligence claims. This
7 proposition seemed to appear first in this case of
8 Battle. It was the -- it's cited in our brief and it's
9 a 1989 case. In that case Battle -- the Court in
12:19PM 10 Battle, with absolutely no analysis, stated that the
11 tort immunity statute only provided -- only applies to
12 negligence and not to intentional torts.

13 In their -- the small analysis that they did do
14 was even flawed because they relied on -- that Court
12:19PM 15 relied on the Autry v. Lawrence decision in doing so for
16 the proposition that tort immunity applies to negligence
17 claims. But the Autry v. Lawrence case was an
18 intentional tort case. And so what's happened since
19 then is the Battle Court put it out there and it has
12:19PM 20 been picked up by other courts without analysis.

21 But there have been recent analyses about this
22 situation -- about this issue. Recently in Williams v.
23 Pate -- it's a 2015 Ark. App. 327. And I do understand
24 that this is an Arkansas Court of Appeals decision.
12:20PM 25 However, the rehearing was denied by the Arkansas

1 Supreme Court over a rather strong dissent that the
2 Arkansas Supreme -- the -- a rather strong dissent
3 requesting that the Court hear it because -- and I
4 apologize. I can't read the justice who was dissenting,
5 and it said the Williams v. Pate decision is contrary to
6 the Battle decision.

7 So very recently, 2015, at Williams v. Pate, it
8 was a Arkansas Court of Appeals case in which a --
9 allegations were made for conversion, trespass, and
10 felony tort. The Court reviewed the allegations and
11 said, although it's an intentional tort, we're going
12 to -- our analysis doesn't stop there. Let's go look at
13 what the actor actually did and did they have knowledge
14 that they were committing intentional torts.

15 THE COURT: Well --

16 MS. KENDALL: And in that case, the Court says
17 there was no knowledge. Although they committed this
18 intention tort, there was no knowledge they committed an
19 intentional tort.

20 THE COURT: Well, what about the Trammell
21 versus Wright case from last year?

22 MS. KENDALL: Sure.

23 THE COURT: And the quote that I wrote down was
24 the Arkansas Supreme Court, quote, "has consistently
25 held that Section 21-9-301 provides City employees with

1 immunity from civil liability for negligent acts but not
2 for intentional acts."

3 MS. KENDALL: Sure. And, your Honor, in that
4 same paragraph, that's where the Court says that Officer
12:21PM 5 Trammell was arguing to the Court that although it was
6 an intentional tort that he committed, he should have
7 been afforded immunity.

8 And the Court goes on to say, because we hold
9 that Officer Trammell had not committed any intentional
12:21PM 10 torts, we will not address his last point on appeal as
11 to whether the tort immunity statute provides immunity
12 against all torts, including intentional torts.

13 So in that case, your Honor, although they said
14 they have consistently held that, they went on to say
12:21PM 15 "We're not going to address the argument that was
16 submitted in Trammell," which is the same argument we're
17 submitting here today, your Honor. We're not going to
18 address the argument that was submitted in Trammell
19 because they decided it based on different grounds.

12:22PM 20 And if you look at the concurring opinion that
21 special justice Gardner provided, a rather long
22 concurring opinion, and really cautioned the Court and
23 said, "We've got inconsistencies, and it's not enough to
24 look at whether there is a tort for negligence and tort
12:22PM 25 for intentional versus negligent -- excuse me. Excuse

1 me, your Honor -- immunity for intentional versus
2 negligent torts; we have got to look further into that.
3 And -- but he specifically says that applying immunity
4 based solely on negligence versus intentional tort
12:22PM 5 analysis is insufficient. In this Court's opinion, in
6 Battle and other similar cases should be qualified, to
7 the extent necessary, to accommodate the additional
8 analysis.

9 And the additional analysis is the analysis
12:23PM 10 that was set forth in the Williams v. Pate case in which
11 the Arkansas Supreme Court denied rehearing.

12 THE COURT: All right. Let's go to your
13 12(b)(6) argument.

14 MS. KENDALL: Sure.

12:23PM 15 THE COURT: And let's --

16 MS. KENDALL: And, your Honor, if I could just
17 very briefly. After Battle -- before Battle, there were
18 Arkansas Supreme Court cases that applied immunity to
19 intentional tort claims. They are cited in our brief.
12:23PM 20 And after Battle, there continue to be Arkansas Supreme
21 Court cases that apply qualified immunity to intentional
22 torts, even after Battle. The law is very inconsistent
23 in Arkansas on that issue.

24 Okay. Yes. So --

12:23PM 25 THE COURT: On your first invasion of privacy

1 claim, the disclosure -- public disclosure of a private
2 fact, which elements of that cause of action, as we
3 understand from either the restatements second or the
4 AMI --

12:23PM

5 MS. KENDALL: Sure, your Honor. I'm sorry.

6 THE COURT: -- are missing from the same
7 complaint?

8 MS. KENDALL: Thank you.

12:24PM

9 Your Honor, there was public disclosure of a
10 private factor, two elements that are missing there.
11 First of all, it was already public. The information
12 that was provided in the redacted police report was
13 information that had already been published. It had
14 been published online by In Touch.

12:24PM

15 It was known to family -- by their own
16 admissions, it was known to family, it was known by
17 friends, it was known by members of the church. It was
18 known by the person who anonymously reported it to the
19 Oprah Winfrey show. So these were not private facts.

12:24PM

20 They had already made their way into the public
21 domain -- or, excuse me, they were private facts that
22 had already been made public by the time we released our
23 police report under FOIA.

12:24PM

24 The other issue is it was only published to one
25 party, and there's an Eighth Circuit court case that

1 discusses the fact that -- and I think this is actually
2 cited extensively in Mr. Owens' brief -- that it was
3 only published to one party, and disclosure to one party
4 was insufficient to state a claim.

12:25PM

5 Your Honor, the FOIA request came from an
6 attorney's office. It did not come from In Touch, and
7 there was nothing in the FOIA request that indicated
8 that it was from In Touch or that they were releasing
9 information to In Touch. We released information to one
10 attorney, and the case law is clear that disclosure
11 by -- to one party is insufficient.

12:25PM

12 So for those reasons, the public disclosure of
13 private facts fails.

12:25PM

14 THE COURT: All right. And intrusion upon
15 seclusion?

12:25PM

16 MS. KENDALL: Sure. Your Honor, I cited
17 this -- to this Court, its previous decision in the
18 Wolfe v. Fayetteville School District case. Outrage is
19 a very, very narrow test, as this Court's aware. I'm
20 not going to reiterate too much. It's a narrow test.
21 It's reserved for the most heinous conduct. There are
22 cases within Arkansas that say kicking, racial slurs,
23 death threats, those don't rise to the level of outrage.

12:26PM

24 In this case what we have is, at best, at best,
25 the negligent release of a FOIA -- of a police report

1 under FOIA. We don't have an intention to act willfully
2 or wantonly. We don't have extreme or outrageous
3 conduct. And for that reason, your Honor -- for those
4 reasons, your Honor, plaintiffs have failed to reach
5 their burden of establishing claim for outrage by the
6 allegations in their complaint.

7 THE COURT: All right. Thank you very much.

8 MS. KENDALL: Thank you, your Honor.

9 THE COURT: Mr. Owens, would you like to pile
10 on to anything Ms. Kendall has had to say?

11 MR. OWENS: Happily, your Honor. I've just got
12 a few things I want to go over.

13 With respect to the immunity issues, we
14 likewise believe that statutory immunity should be
15 afforded in light of the uncertainty created by Williams
16 versus Pate and the Supreme Court not reaching the issue
17 when it easily could have in the other case -- I believe
18 it was Trammell -- when they easily could have said,
19 well, immunity doesn't apply here; but even though it
20 doesn't apply, it could have easily reached that issue.

21 Now, the other argument could be made as well,
22 but we think there's enough uncertainty that the Court
23 ought to look to the plain language of the statute.
24 Immunity from suit doesn't mean affirmative defense. It
25 means immunity from suit. That's our position.

1 Immunity from suit in tort doesn't mean some torts; it
2 means all torts. That's just our position based on the
3 plain language of the statute.

12:27PM 4 We've also asserted, I believe, qualified
5 immunity. The Arkansas law broadly grants qualified
6 immunity to public officers for violation of any
7 clearly -- anything that's not a violation of clearly
8 established law across the spectrum. We don't think
9 that any of that has been alleged here.

12:28PM 10 With respect to intrusion upon seclusion, it's
11 hard to find an element that has been pled. The
12 intrusion, I guess, is the disclosure of eight or ten
13 pieces of paper to a third party. Hard to see how that
14 intrudes upon the plaintiffs in this case.

12:28PM 15 Seclusion, as well, hard to see what kind of
16 seclusion we're talking about. Certainly these things
17 aren't pled. What's really being alleged here is some
18 sort of vicarious intrusion upon seclusion.

12:28PM 19 This idea that we disclosed something, the
20 county disclosed something which caused somebody else to
21 intrude upon their seclusion, that's not a recognized
22 tort. It's certainly not clearly established law.

23 The restatements and the Arkansas case law
24 require an actual intrusion. Doesn't have to be
12:29PM 25 physical, but it has to be an intrusion, and it has to

1 actually be seclusion. Far from secluded; these
2 plaintiffs were public figures.

3 With respect to public disclosure of private
4 facts, it also fails on several counts. First is
12:29PM 5 publication. This was disclosed to one lawyer. The
6 plaintiffs assert that that constitutes publication
7 because we should have known that that lawyer
8 represented the press somehow; and the assertion that
9 the press should somehow get less in FOI than everybody
10 else.

11 That's the assertion made in plaintiffs'
12 response: That even though we only disclosed it to one
13 lawyer that because we somehow should have known that
14 that lawyer represented a press entity that we should
12:30PM 15 have afforded them less in terms of disclosure than
16 someone else. I don't see that anywhere in the FOIA or
17 in the case law; in fact, the FOIA was largely promoted
18 and prompted by the Courts. It's a very oppressed,
19 friendly statute.

12:30PM 20 The waiver of privilege is another matter. You
21 know, the question there is whether this touched on
22 matters of public concern. Well, obviously the public
23 is concerned about sexual offenses. We've got a whole
24 registry set up in the State of Arkansas to register sex
12:31PM 25 offenders.

1 The plaintiff here, the plaintiffs have felt
2 free throughout the briefing and the arguments here to
3 call him a criminal and say he committed a criminal
4 offense and a sexual assault. I rarely, if at all,
12:31PM 5 heard the word "alleged" because this guy was never
6 charged or convicted of anything. But nevertheless, the
7 terms are "sexual assault" and "sexual offense" that are
8 being used in the briefing by plaintiff and plaintiffs'
9 counsel and, yet, somehow the fact that this guy
12:31PM 10 committed a sexual offense according to the plaintiffs
11 and it was never reported to the public at large, you
12 know, what about the day care he applies to? Don't they
13 have some right to know that this guy allegedly
14 committed these offenses? That's what the whole sex
12:32PM 15 register -- sex offender registry is set up for.

16 There's certainly a massive amount of public
17 concern for the identity and location of sex offenders.
18 Now, they say, "Well, we're talking about the victims
19 here"; but in the same breath, they concede that the
12:32PM 20 victims' names were redacted. No one's ever contested
21 that fact. So we think that there's a privilege there
22 because these were matters of public concerns and a
23 privilege that we were acting under statutory authority;
24 indeed, statutory duty under the FOIA.

12:32PM 25 I think that's all I have on the statutory

1 arguments. I mean, essentially we're saying that they
2 just haven't alleged -- well, outrage is the last one I
3 didn't speak to, but outrage is such a narrow claim in
4 Arkansas. You have to allege so much.

12:32PM

5 Outrage is kind of the satisfaction of a FOIA
6 request, even if you presume the alleged underredaction
7 that the plaintiffs allege in their complaint just
8 doesn't rise to the level of outrage. Thank your Honor.

9 THE COURT: All right. Thank you, Mr. Owens.

12:33PM

10 Mr. Bledsoe, would you like to respond?

11 MR. BLEDSOE: Your Honor, we've briefed these
12 issues. I really don't have much to add, other than I'm
13 outraged. No admission of wrongdoing, no shame, no
14 apology, no "We'll never let this happen again to any
15 little girl."

12:33PM

16 They released the details, not just the
17 identities but the details of sexual assaults on minors.
18 These four girls are going to live the rest of their
19 lives --

12:34PM

20 THE COURT: Mr. Bledsoe, I don't know of anyone
21 in this courtroom that is going to take the other side
22 of the argument that sexual abuse of a young girl is a
23 bad thing. You're not going to find many, if anyone, to
24 oppose you on that. I don't really think that's the
25 issue before the Court today, though.

12:34PM

1 MR. BLEDSOE: I'll get to the heart of the
2 matter. This court is not the place to overrule the
3 Arkansas Supreme Court. Arkansas law, as it stands,
4 does not extend immunity to tort. It also, frankly,
5 doesn't extend immunity to negligent actions in the
6 cases where there's insurance. There's been no
7 allegation here that there isn't insurance on behalf of
8 the City and the County.

9 So we believe -- they are making, in many
10 instances -- in almost every instance -- Rule 56
11 arguments. As far as the pleading goes, we've pled
12 intentional conduct, we've pled that they -- this wasn't
13 just a disclosure to one lawyer in Little Rock.

14 We have pled that they knew where this was
15 going; they knew it was being disclosed to the press.
16 They disclosed it, the City disclosed it, and rushed to
17 disclose it in time to meet a publication deadline.
18 That wasn't a lawyer's publication deadline. That was
19 In Touch magazine's publication deadline.

20 So we -- our complaint addresses all of the
21 issues they've raised. If they want to bring them up
22 again on summary judgment, that's fine, but I really
23 don't have anything more to add than our briefing
24 because between the complaint and our briefing, we have
25 addressed all of these arguments, your Honor.

1 THE COURT: And I guess you agree that all of
2 your torts as alleged are intentional torts that require
3 intentional conduct; is that right?

4 MR. BLEDSOE: Yes.

12:36PM

5 THE COURT: And as a consequence of that, there
6 is no statutory immunity?

7 MR. BLEDSOE: Yes.

8 THE COURT: All right.

12:36PM

9 MR. BLEDSOE: But to the extent they are going
10 to fall back on negligence, unless there's an absence of
11 insurance coverage, which has not been raised, we
12 believe we could allege negligence as a basis for
13 liability, not on the intentional torts but just on the
14 conduct.

12:36PM

15 THE COURT: You could. What I'm trying to get
16 you to acknowledge is that as pled in the current
17 version of the complaint, you have alleged three
18 intentional torts.

19 MR. BLEDSOE: Yes.

12:36PM

20 THE COURT: You mentioned that you had never
21 been to Arkansas before. Have you had an opportunity to
22 read the rather dim view that the Arkansas Supreme Court
23 takes of the tort of outrage?

24 MR. BLEDSOE: No. That would be a situation
25 where I'm relying on my cocounsel, but -- and I say that

12:37PM

1 in jest. But, no, I have not read a case addressing the
2 issue that your Honor just raised.

3 We believe that on these facts, the knowing
4 disclosure for publication by a tabloid of the details
12:37PM 5 of the sexual assault on minors, not just identities but
6 the details, satisfies those elements.

7 THE COURT: All right. Thank you as such,
8 Mr. Bledsoe.

9 MR. BLEDSOE: Thank your Honor.

12:37PM 10 THE COURT: The Court is going to take the
11 defendants' motions under advisement. I have to have an
12 opinion out within the week.

13 My understanding, Mr. Eichmann and Mr. Owens,
14 is that to the extent that the Court were to rule
12:38PM 15 against you -- I'm not saying that the Court is; I'm
16 just saying to the extent that the Court does, you are
17 planning on taking an interlocutory appeal of that; is
18 that correct?

19 MR. OWENS: Your Honor, I always hesitate to
12:38PM 20 say because the Court may convince me otherwise, but --

21 THE COURT: Well, let me make -- see if you can
22 help me with this. To the extent, A, that the Court
23 does rule against you -- and I'm not saying that it is,
24 but if it were to, and you make a decision that you're
12:38PM 25 not going to take an interlocutory appeal, then as soon

1 as you have reached that conclusion, will you please let
2 us know because we do need to schedule a case management
3 hearing and that's the only reason why I'm pressing you
4 on it today.

12:38PM

5 MR. OWENS: Absolutely, your Honor. We'll do
6 that with all due speed.

7 MR. EICHMANN: Yes, your Honor, we'll be
8 expeditious in that decision.

12:38PM

9 THE COURT: All right. I think that will
10 conclude our hearing today, although I would like to ask
11 to see certain counsel in chambers. I'd like to see
12 Mr. Bledsoe, Mr. Daniels, and one member of the City's
13 team -- well, the County's defense team, which would be
14 Mr. Owens, and Ms. Kolb, if she cares to.

12:39PM

15 We're adjourned.

16 (Proceedings adjourned at 12:39 p.m.)

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1 CERTIFICATE OF OFFICIAL REPORTER

2
3 I, Dana Hayden, Federal Official Realtime Court
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